

UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	:	
	:	
v.	:	CR No. 22-00051-WES
	:	
MICHAEL A. DiROCCO	:	

**REPORT AND RECOMMENDATION**

Lincoln D. Almond, United States Magistrate Judge

This matter has been referred to me pursuant to 28 U.S.C. § 636(b)(1)(B) and 18 U.S.C. § 3401(i) for proposed findings of fact concerning whether Defendant is in violation of the terms of his supervised release and, if so, to recommend a disposition of this matter. In compliance with that directive and in accordance with 18 U.S.C. § 3583(e) and Fed. R. Crim. P. 32.1, a revocation hearing was held on March 6, 2023, at which time Defendant, through counsel and personally, admitted that he was in violation of his supervised release conditions as charged. At this hearing, I ordered Defendant detained pending my Report and Recommendation and final sentencing before District Judge William E. Smith.

Based upon the following analysis and the admission of Defendant, I recommend that Defendant be committed to the Bureau of Prisons for a term of six months followed by forty-eight months of supervised release with special conditions.

**Background**

On July 28, 2022, the Probation Office petitioned the Court for the issuance of an arrest warrant. On that date, the District Court reviewed the request and ordered the issuance of a

warrant. On March 6, 2023, Defendant was brought before the Court for a revocation hearing at which time he admitted to the following charges:

**Violation No. 1. Mandatory Condition. Defendant must not commit another federal, state, or local crime.**

On April 18, 2022, Defendant committed the crimes of Possession of Fentanyl (misdemeanor); DUI of Liquor/Drugs – Blood Concentration Unknown – 1st Offense (misdemeanor); and Operating with a Suspended License 3rd Offense (misdemeanor), as evidenced by his arrest by Rhode Island State Police. On July 21, 2022, an Information was filed on this case which remains pending at Providence Superior Court under Docket Number P2-2022-2538A. Defendant's next court date is scheduled for October 6, 2022 for a pre-arraignment conference.

**Violation No. 2. Mandatory Condition. Defendant must refrain from any unlawful use of a controlled substance. Defendant must submit to one drug test within fifteen days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.**

On or about January 11, 2022, Defendant used marijuana as evidenced by a positive urinalysis screen obtained on that date. On or about February 24, 2022, Defendant used marijuana as evidenced by a positive urinalysis screen obtained on that date. On March 30, 2022, Defendant adulterated a urinalysis sample by means of adding water to the sample as evidenced by abnormal creatine levels on the urinalysis screen obtained on that date and later by his own admission to Probation Officer Whitlock on April 12, 2022. On or about April 12, 2022, Defendant used marijuana and fentanyl as evidenced by a positive urinalysis screen obtained on that date. On July 28, 2022, Defendant admitted to relapsing on fentanyl. Defendant refused to provide his location or where he would be residing.

**Violation No. 3. Special Condition. Defendant is to participate in a program for substance abuse counseling as directed by the Probation Office, which program may include testing, not to exceed 104 drug tests per year, to determine whether Defendant has reverted to the use of alcohol or drugs. Defendant shall be required to contribute to the costs of services for such treatment based on the ability to pay or availability of third-party payment.**

On April 26, 2022, Defendant was admitted to Zinnia Exeter Residential Treatment Facility for a period of up to ninety days. On May 11, 2022, Defendant was administratively discharged after being placed on a behavioral contract for violating program rules. Defendant was ultimately discharged for continuing to violate program rules. On May 19, 2022, Defendant was admitted to Bridgemark Residential Treatment Facility. On July 27, 2022, Defendant was discharged for noncompliance when he presented at the Residential Treatment Facility after work with evidence of intoxication. Defendant refused a drug test and was transported by ambulance to the hospital where he refused a drug test and medical care.

### **Recommended Disposition**

Section 3583(e)(2) provides that if the Court finds that Defendant violated a condition of supervised release, the Court may extend the term of supervised release if less than the maximum term was previously imposed. The maximum term of supervised release was previously imposed; therefore, the term cannot be extended.

Section 3583(e)(3), provides that the Court may revoke a term of supervised release and require the Defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term or supervised release without credit for time previously served on post release supervision, if the Court finds by a preponderance of evidence that the defendant has violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be sentenced to a term beyond 5 years if the instant offense was a Class A felony, 3 years for a Class B felony, 2 years for a Class C or D felony, or 1 year for a Class E felony or a misdemeanor. If a term of imprisonment was imposed as a result of a previous supervised release revocation, that term of imprisonment must be subtracted from the above-stated maximums to arrive at the current remaining statutory maximum sentence. Defendant was on supervision for a Class B felony. Therefore, he may not be required to serve more than three years' imprisonment upon revocation.

Pursuant to 18 U.S.C. § 3583(h) and § 7B1.3(g)(2), when a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized, the Court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. The authorized statutory maximum term of supervised release is five years. The Court may impose the above-noted statutory maximum, minus the term of imprisonment that is to be imposed for this revocation.

Section 7B1.1 provides for three grades of violations (A, B, and C). Subsection (b) states that where there is more than one violation, or the violation includes more than one offense, the grade of violation is determined by the violation having the most serious grade.

Section 7B1.1(a) notes that a Grade A violation constitutes conduct which is punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device; or any other offense punishable by a term of imprisonment exceeding twenty years. Grade B violations are conduct constituting any other offense punishable by a term of imprisonment exceeding one year. Grade C violations are conduct constituting an offense punishable by a term of imprisonment of one year or less; or a violation of any other condition of supervision.

Section 7B1.3(a)(1) states that upon a finding of a Grade A or B violation, the Court shall revoke supervision. Subsection (a)(2) provides that upon a finding of a Grade C violation,

the court may revoke, extend, or modify the conditions of supervision. Defendant has committed a Grade C violation. Therefore, the Court shall revoke supervision.

Section 7B1.3(c)(1) provides that where the minimum term of imprisonment determined under § 7B1.4 is at least one month, but not more than six months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e) for any portion of the minimum term. Should the Court find that Defendant has committed a Grade B or C violation, § 7B1.3(c)(2) states that where the minimum term of imprisonment determined under § 7B1.4 is more than six months but not more than ten months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment. Neither of these provisions apply to this matter.

Section 7B1.3(d) states that any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under § 7B1.4 (Term of Imprisonment), and any such unserved period of confinement or detention may be converted to an equivalent period of imprisonment. There is no outstanding restitution, fine, community confinement, home detention, or intermittent confinement.

Section 7B1.4(a) provides that the criminal history category is the category applicable at the time Defendant was originally sentenced. Defendant had a Criminal History Category of VI at the time of sentencing.

Should the Court revoke supervised release, the Revocation Table provided for in § 7B1.4(a) provides the applicable imprisonment range. Defendant committed a Grade C violation and has a Criminal History Category of VI. Therefore, the applicable range of imprisonment for this violation is eight to fourteen months, and the maximum by statute is twenty-four months.

Section 7B1.5(b) provides that, upon revocation of supervised release, no credit shall be given toward any term of imprisonment ordered, for time previously served on post-release supervision.

#### **Analysis and Recommendation**

Defendant has a lengthy criminal history and long-standing drug addiction issues. He has admitted to Grade C violations, and the guideline range is eight to fourteen months. The Government argues for a ten-month sentence, and the defense seeks a non-jail sentence and release into residential drug treatment.

Defendant's violations clearly arise out of his drug addiction issues. On April 18, 2022, Defendant was charged with possessing fentanyl and operating a motor vehicle under the influence of drugs. He was involved in a motor vehicle accident while suffering the effects of a drug overdose, and the responding state trooper administered NARCAN.

After this incident, Defendant was allowed the opportunity to defer appearance on this violation while he participated in residential drug treatment. Defendant had short stints in two programs that both resulted in discharge for rule violations. Defendant then made the

unfortunate decision to discontinue contact with Probation and abscond from supervision. The Court was forced to issue a warrant on July 28, 2022, and several months passed before Defendant was arrested and brought before the Court for these violations.

Although Defendant reported he was working during this period, he was admittedly also abusing drugs. Defendant's request for a non-jail sentence is unreasonable on this record. After being given multiple opportunities at residential drug treatment in lieu of detention, Defendant absconded from supervision. Absconding cannot be tolerated, and some period of incarceration is necessary to deter this Defendant, and others on supervision, from doing so. In addition, Defendant's decision to drive while impaired endangered the community and resulted in a motor vehicle accident (although thankfully there were no serious injuries reported).

On balance, I recommend a six-month sentence as reasonable in this case. I also recommend a further forty-eight-month term of supervised release with special conditions, including the requirement that Defendant spend the first ninety days of supervised release in a residential drug treatment program.

### **Conclusion**

After considering the sentencing factors set forth in 18 U.S.C. § 3553(a), I recommend that Defendant be committed to the Bureau of Prisons for a term of six months followed by forty-eight months of supervision with the following special conditions:

1. For the first ninety days of supervised release, Defendant shall reside at a residential drug treatment program. While at said program, Defendant shall comply with all the policies, procedures, and regulations therein.
2. Defendant shall participate in a manualized behavioral program as directed by the Probation Office. Such program may include group sessions led by a counselor or

participation in a program administered by the Probation Office. Defendant shall pay for the cost of treatment to the extent he is able as determined by the Probation Officer.

3. The Court makes a judicial recommendation that Defendant consider participation in the HOPE Court program.

4. Defendant shall participate in a program of substance abuse treatment (inpatient or outpatient) as directed and approved by the Probation Office.

5. Defendant shall participate in a program of substance abuse testing (up to seventy-two drug tests per year) as directed and approved by the Probation Office.

6. Defendant shall participate in a program of mental health treatment as directed and approved by the Probation Office.

7. Defendant shall contribute to the cost of all ordered treatment and testing based on ability to pay as determined by the Probation Officer.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of Court within fourteen days of its receipt. Fed. R. Crim. P. 59; LR Cr 57.2. Failure to file specific objections in a timely manner constitutes a waiver of the right to review by the District Court and the right to appeal the District Court's Decision. United States v. Valencia-Copete, 792 F.2d 4 (1<sup>st</sup> Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1<sup>st</sup> Cir. 1980).

/s/ Lincoln D. Almond  
LINCOLN D. ALMOND  
United States Magistrate Judge  
March 7, 2023